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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1947.

No. 834

HORACE A. YOUNG, BETTY JEAN GILBERT AND PATSY MARIE GILBERT, MINORS, BY MRS. EDNA MATTHEWS GILBERT, THEIR TUTRIX AND AS NEXT FRIEND; CORBIN DISMUKES AND GERALDINE DISMUKES ROBERTS, *Petitioners,*

vs.

ASA C. GARRETT, FRANK GARRETT, R. S. FOSTER, MID-CONTINENT PETROLEUM CORPORATION AND THE CARTER OIL COMPANY, A CORPORATION, *Respondents.*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF *CERTIORARI* AND TO THEIR BRIEF IN SUPPORT THEREOF.

Petitioners herein seek a *writ of certiorari* to the Supreme Court of Arkansas to obtain review of a judgment of that court affirming a judgment of dismissal of the above entitled action entered by the Chancery Court of Columbia County, Arkansas, upon respondents' demurrer to petitioners' complaint and amendments thereto and to their amended and supplemental complaint. Both of said courts held

that said action was barred by the Arkansas statutes of limitation. (R. 62-74)

Petitioners' petition herein must be denied because no federal question is presented herein, and even if any federal question is presented the same was not timely and properly raised in the court below. Because we think it will be conducive to clarity, before discussing the jurisdiction of this Court, and petitioners' contentions herein, we will make a statement of the pertinent facts herein.

The above action was commenced by petitioners in the aforesaid Chancery Court on September 19, 1946, against respondents herein, to establish title to, and recover possession of, an undivided 1/9th interest in and to certain described lands in Columbia County, Arkansas, and for an accounting for rents, issues and profits therefrom. Petitioners claim that Mary Christine Pace, who is alleged to have been *non compos mentis* from the date of her birth on August 24, 1865, to the date of her death on December 27, 1939, acquired an undivided 1/9th interest in said land, on the death of her mother, Sarah E. Pace, on February 14, 1898. Petitioner Young claims an undivided 5/6ths of said 1/9th interest allegedly so acquired by Mary Christine Pace by purchase thereof from alleged heirs and heirs of heirs of Mary Christine Pace. The remaining petitioners, who we will hereinafter refer to as the Gilbert group, claim an undivided 1/6th of said 1/9th interest by inheritance of 1/7th thereof from Mary Christine Pace and by inheritance of 1/6th of 1/7th thereof from Bob Winfield Pace, which interest they claim Bob Winfield Pace inherited from his sister, Mary Christine Pace. Two of the petitioners in the Gilbert group, Betty Jean Gilbert and Patsy Marie Gilbert, each of whom claim an undivided 1/324th interest in the land involved herein, are alleged to be minors. (R. 1-10, 24, 40-50)

Respondents and their predecessors in interest have been in adverse possession of the land involved herein and have paid taxes thereon continuously since about August 28, 1890, long prior to the death of Mary Christine Pace. (*Young* v. *Garrett, et al.,* 5 F. R. D. 117, loc cit. 122.)

Petitioners do not deny that the above action was barred by the Arkansas statutes of limitation unless the same was brought within the time prescribed by Section 8947, Pope's Digest of the Statutes of Arkansas, which authorizes the maintenance of an action otherwise barred by limitation if the same is commenced within one year after a nonsuit is suffered in a prior action commenced within the period allowed by the statutes of limitation, or unless the same was not barred as to the aforesaid minor petitioners under Section 8939, Pope's Digest of the Statutes of Arkansas, because of their minority. Petitioners claim that the Supreme Court of Arkansas erred in not holding that said action was commenced within one year after they suffered nonsuits in certain actions commenced in the United States District Court for the Western District of Arkansas within the period prescribed by Section 8918, Pope's Digest of the Statutes of Arkansas, and further erred in not holding that under said Section 8939 said minor petitioners were not barred because of their minority.

One of the above referred to actions commenced in the United States District Court for the Western District of Arkansas was filed by Young on December 24, 1942, and the other thereof was filed by the Gilbert group on the same date. Therein, Young and Gilbert group, respectively, asserted the same basic claims asserted by them herein. (R. 45) On September 14, 1943, the United States District Court entered judgments dismissing said actions upon the ground that the court was without jurisdiction thereof. (R. 1, 45;

Young v. *Garrett, et al.*, 3 F. R. D. 193.) Young and the Gilbert group, without requesting or being granted leave to amend their respective complaints, each appealed from said judgments of dismissal to the United States Circuit Court of Appeals for the Eighth Circuit, and on May 9, 1945, said court handed down its decision affirming said judgments of dismissal without modification or qualification. (R. 1-2, 28, 30, 45; *Young* v. *Garrett, et al.*, 5 F. R. D. 117, loc. cit. 119, 149 F. (2d) 223.) Thereafter, Young and the Gilbert group each filed petitions for rehearing or for remand of said actions to the District Court for amendment of their respective complaints in order that they might establish jurisdiction of a part of their respective claims. (R. 30, 31) On August 8, 1945, the court denied said petitions for rehearing and remanded said actions to the District Court with instructions to "permit the appellants to apply to that court for leave to amend their complaint, if they so elect, for the purpose of stating jurisdiction, if possible * * *." (R. 30-31) The Circuit Court of Appeals did not vacate or set aside, or direct the District Court to vacate or set aside, the District Court's judgments of dismissal and did not grant either Young or the Gilbert group leave to amend their respective complaints, but merely gave them permission to apply to the District Court for leave to amend the same.

Thereafter, on September 24, 1945, petitioners filed, in the United States District Court, in their respective actions, motions for leave to file amended and substituted complaints, copies of which were attached to their respective motions. In an effort to overcome objections to the jurisdiction of the federal court, petitioners in their respective proffered amended and substituted complaints, limited to a certain extent their respective claims to recover rents, is-

sues and profits from, and damages to, the land involved herein. On February 28, 1946, the United States District Court denied leave to file said proffered amended and substituted complaints in each of said actions upon the grounds, (*1*) that, because final judgments of dismissal had been entered in each of said actions on September 14, 1943, more than six months prior to the date said motions to file amended and substituted complaints were filed, the court, under Rule 60(b) of the Federal Rules of Civil Procedure was without power to set aside said judgments of dismissal and to permit said amended and substituted complaints to be filed, and (*2*) that, assuming that the court had such power, the facts and circumstances in each of said cases would not justify granting permission to file the same. (R. 2, 28, 45-46; *Young* v. *Garrett, et al.*, 5 F. R. D. 117.) In other words, the District Court held that, since its judgments of dismissal entered on September 14, 1943, had been affirmed on May 9, 1945, without qualification or modification, and petitions for rehearing had been denied on August 8, 1945, it could not permit petitioners to file amended and substituted complaints without vacating or modifying said judgments of dismisal, which, under Rule 60(b) of the Federal Rules of Civil Procedure, it was without authority to do. Differently stated it held that after August 8, 1945, said judgments of dismissal were final judgments. Petitioners appealed to the Circuit Court of Appeals for the Eighth Circuit from said judgments of the District Court, and on February 25, 1947, after the commencement of the case at bar, said Circuit Court of Appeals affirmed said judgments of the District Court. (R. 2, 46; *Young* v. *Garrett, et al.*, 159 F. (2d) 634.) Petitioners requested an extension of time for hearing herein in the Chancery Court to afford them time to apply to this Court for a *writ of certiorari* to the Circuit Court of Appeals but abandoned their plan therefor. (R. 34-35, 36)

A very comprehensive history of the litigation between the parties hereto prior to the commencement of the case at bar appears in the opinion of the District Court in *Young* v. *Garrett, et al.,* 5 F. R. D. 117, and we respectfully refer the Court thereto.

The Supreme Court of Arkansas in its opinion herein, after reciting the facts in connection with the aforesaid actions in the federal court and the judgments of the District Court and the Circuit Court of Appeals therein, and after referring to the holding of the District Court as to the effect of Rule 60(b) of the Federal Rules of Civil Procedure upon the finality of said court's aforesaid judgments of dismissal, said:

> "Under this construction of the rule—a construction we must accept in view of the affirmance without a finding that the District Court was in error on any point advanced—the problem presented is whether (as appellants contend) the statute of limitation was tolled not only during the period of appeal from the order of September 14, 1943, but during the time that ran after the decision of August 8, 1945.
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> "But wording of the act (8947, Pope's Digest) does not justify belief that it was the legislative purpose to so liberalize this gratuity (the privilege of filing a new action) that irrespective of adverse judicial decisions in a given case that the controversy in that jurisdiction had been terminated, a period of one year would yet remain while courts were reaffirming what had already been explicitly held.
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> "When the Court of Appeals refused to grant a rehearing and affirmed Judge MILLER's order of dismissal, it appears to have attempted to confer upon the trial court a power subsequently found to be non-existent. That is the effect of Judge MILLER's holding, and

on appeal for the second time in these cases he was not reversed. So, in effect, rights of the parties to maintain their suits in federal court were settled by the appellate court August 8, 1945, and under Rule 60(b) the judgment was a finality. If treated as a nonsuit—an issue we do not decide—more than a year elapsed before the chancery suit was filed in September of the following year." (R. 72-73)

It is obvious from the foregoing that petitioners' contention herein that the Supreme Court of Arkansas "determined" that the aforesaid order of the Circuit Court of Appeals of August 8, 1945, "allowed no further proceedings in the federal courts" is wholly unfounded. Said court did not suggest or intimate that such was the effect of said order. Said court merely held that further proceedings had in the federal courts did not extend the time allowed for filing the case at bar.

It is also obvious that petitioners' contention herein that the Supreme Court of Arkansas "wrongfuly determined" that the aforesaid orders of the Circuit Court of Appeals of August 8, 1945, constituted nonsuits as of said date in the aforesaid actions in the federal court is wholly unfounded. Said court specifically declined to determine whether petitioners suffered nonsuit in their prior actions on said date. It held that the time to file a new action, under the aforesaid Section 8947, Pope's Digest, after a judgment of dismissal in a prior action had been affirmed by an appellate court was not extended while the courts were reaffirming such judgment, regardless of whether a technical nonsuit was suffered. In fact petitioners allege in the fourth reason relied upon in their petition herein that the Supreme Court of Arkansas erroneously refused to determine when they suffered nonsuits in their aforesaid actions in the federal court.

Furthermore, even if the Supreme Court of Arkansas had held that petitioners suffered nonsuits in their aforesaid actions in the federal court on August 8, 1945, its holding would have been absolutely correct and not erroneous. As we have hereinabove seen, the Circuit Court of Appeals affirmed the District Court's judgments of dismissal therein, refused to vacate, or to authorize the District Court to vacate the same, and in its aforesaid order of August 8, 1945, denying petitioners' petitions for rehearing, merely gave petitioners permission to do what they had the right to do without such permission, *i. e.*, apply to the District Court to vacate its judgments of dismissal and request leave to file amended complaints. Until said judgments of dismissal were vacated no amended complaints could be filed or any other proceedings had, and the same stood as nonsuits. *Realty Acceptance Corp.* v. *Montgomery,* 284 U. S. 547, 76 L. ed. 476; *Ellison, et al.,* v. *Ward, et al.,* 294 Ill. A. 197, 13 N. E. (2d) 649; 27 C. J. S., p. 261, Sec. 77; and 17 Am. Jur., p. 90, Sec. 63. And under all the authorities the time to file a new action under statutes similar to the aforesaid Section 8947 is not stayed, pending determination of an application to vacate or set aside a judgment of dismissal in a former action, *Zielinski* v. *United States,* (C. C. A. 2d) 120 F. (2d) 792; *Waterman* v. *Powell,* (C. C. A. 5th) 66 F. (2d) 80, and *Adams* v. *Holton,* 111 Ia. 54, 82 N. W. 468. Clearly, petitioners' motions for permission to amend their complaints were, under the circumstances, motions to vacate said judgments of dismissal and to permit filing of amended complaints.

It is further obvious from the foregoing that petitioners' contention herein that the Supreme Court of Arkansas ignored, and failed to give full faith and credit to, the aforesaid order of the Circuit Court of Appeals of August 8,

1945, is without merit. Clearly, the Supreme Court of Arkansas accepted, acknowledged and followed the interpretation placed upon said order by the District Court and by the Circuit Court of Appeals in subsequent proceedings in said courts. The District Court held, and the Circuit Court of Appeals affirmed, that under said order of August 8, 1945, neither it nor any other federal court could, after said date, vacate or modify the judgments of dismissal theretofore entered by it, or in other words, that said judgments were final on August 8, 1945, and that is exactly what the Supreme Court of Arkansas said it held. And, since the Supreme Court of Arkansas accepted the conclusion of the District Court and the Circuit Court of Appeals as to the operation and effect of the aforesaid order of August 8, 1945, no federal question is presented herein. 10 Cyc. Fed. Proc., (2d ed.), p. 433; *McLaughlin Bros.* v. *Hallowell,* 228 U. S. 278, 57 L. ed. 835; *Arkansas, ex rel. Utley,* v. *St. Louis & S. F. R. Co.,* 269 U. S. 172, 70 L. ed. 219; *The Winona and St. Peter R. Co.* v. *Town of Plainview,* 143 U. S. 371, 36 L. ed. 191; and *Leonard* v. *Vicksburg S. & P. R. Co.,* 198 U. S. 416, 49 L. ed. 1108.

Furthermore, since the Supreme Court of Arkansas simply determined herein the effect of proceedings in the federal courts after August 8, 1945, upon the running of the time prescribed by the aforesaid Section 8947, Pope's Digest, for the commencement of the case at bar, and merely construed and applied the state statutes of limitation, and since said court recognized and conceded the validity and regularity of said proceedings, no federal question is presented and the decision of said court is not subject to reexamination by this Court. *Moran* v. *Horsky,* 178 U. S. 205, 44 L. ed. 1038; *Carothers* v. *Mayer, et al.,* 164 U. S. 325, 41 L. ed. 453; *Harrison* v. *Myer,* 92 U. S. 111, 23 L. ed. 606;

Preston v. *City of Chicago,* 226 U. S. 447, 57 L. ed. 293; *Wood* v. *Chesborough,* 228 U. S. 672, 57 L. ed. 1018; *Great Western Telegraph Co.* v. *Purdy,* 162 U. S. 329, 40 L. ed. 986; *Avery* v. *Popper,* 179 U. S. 305, 45 L. ed. 203; and 36 C. J. S., p. 160, Sec. 251. The situation involved herein is no different than it would be if the aforesaid orders of August 8, 1945, had been entered by an Arkansas court, and said subsequent proceedings had in Arkansas courts.

It is likewise obvious that petitioners' contention herein that the Supreme Court of Arkansas applied Rule 60(b) of the Federal Rules of Civil Procedure in interpreting and applying the state statutes of limitation is unmeritorious. The Supreme Court of Arkansas did not, in its opinion herein, interpret or apply said rule, but discussed only what the District Court said was the effect of said rule upon the District Court's power to vacate its aforesaid judgments of dismissal. And even if it had looked to said rule to ascertain whether the present action was brought within the time prescribed by the aforesaid Section 8947, Pope's Digest, it still would have been simply construing and applying said statute and, under the decisions above cited, this Court could not review its action.

Petitioners' contentions herein that the Supreme Court of Arkansas denied them their property without due process of law by refusing to determine when they suffered nonsuit in their aforesaid actions in the federal court, by refusing to hold that the aforesaid minor petitioners were not barred by the statutes of limitation, because of their minority, and in allegedly denying to them the benefits of the aforesaid Section 8947, Pope's Digest, do not present any federal question. In the first place it is well established that a decision of a court involving the ownership of property with all parties in interest before it, cannot be regard-

ed by the unsuccessful party as a deprivation of property without due process of law simply because its effect is to deny his claim of ownership in such property. *Tracy* v. *Ginzberg*, 205 U. S. 170, 51 L. ed. 755. In addition, said contentions simply boil down to the claim that the decision of the Supreme Court of Arkansas herein is erroneous, and a constitutional provision is violated by an erroneous decision of a state court. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 74 L. ed. 1107; *In the Matter of Eugene M. Converse*, 137 U. S. 624, 34 L. ed. 796; *Neblett* v. *Carpenter*, 305 U. S. 297, 83 L. ed. 183; *Chicago Life Ins. Co.* v. *Cherry*, 244 U. S. 25, 61 L. ed. 966; *Worchester County Trust Co.* v. *Riley*, 302 U. S. 292, 82 L. ed. 268; and *Bonner* v. *Gorman*, 213 U. S. 86, 53 L. ed. 709. Moreover, as we have hereinabove seen, the Supreme Court of Arkansas did not commit any error in its conclusion that the case at bar was not brought within the time prescribed by said Section 8947. Neither did it err in failing to hold that said minor petitioners were not barred by the statutes of limitation because of their minority. It will be recalled that the cause of action involved herein accrued during the lifetime of Mary Christine Pace, an alleged incompetent, and that said minor petitioners claim their interest in the land involved herein by inheritance of a part thereof from Mary Christine Pace and by inheritance of the remainder thereof from Bob Winfield Pace, which interest they claim Bob Winfield Pace inherited from Mary Christine Pace. It is not claimed that Bob Winfield Pace was incompetent. With respect to the interest said minor petitioners claim by inheritance from Mary Christine Pace, the Supreme Court of Arkansas has held, since at least as early as 1885, that minors cannot attach their disability of minority to the disability of their ancestors to prevent the bar of the statutes of limitation. *Dowell* v. *Tucker*, 45 Ark. 438; *Millington* v. *Hill*, 47 Ark.

301, 1 S. W. 547; *Reed* v. *Money,* 115 Ark. 1, 170 S. W. 478; *Hoggard* v. *Mitchell,* 164 Ark. 296, 261 S. W. 643. And with respect to the interest said petitioners claim by inheritance from Bob Winfield Pace, he not being under disability, the statutes of limitation commenced to run against him and it continued to run against said petitioners, despite their minority. *Bender* v. *Bean,* 52 Ark. 132, 12 S. W. 180, and *Bratton, et al.,* v. *Union Saw Mill Co.,* 168 Ark. 637, 271 S. W. 32.

Petitioners' contention herein that the refusal of the Supreme Court of Arkansas "to determine the status of the claim" of the aforesaid minor petitioners deprived them of their property without due process of law is without substance. The Supreme Court of Arkansas was not under any constitutional or statutory duty to write any opinion herein, much less to include in its opinion any discussion of any claim which might have been made by said minor petitioners that they were not barred by the statutes of limitation because of their minority. *Scott* v. *State,* 49 Ark. 156, 4 S. W. 750. Petitioners point to no authority in support of their instant contention and we are confident that none can be found.

Finally, despite the fact that the Chancery Court held herein that petitioners suffered nonsuits in their actions in the federal court on August 8, 1945, and that petitioners, including the aforesaid minor petitioners, were barred by the statutes of limitation, the record herein does not show that petitioners claimed that said holding presented any federal question or that they were denied any constituional rights by its judgment. (R. 62-67) If the opinion of the Arkansas Supreme Court herein presents any federal questions, obviously, the same questions were presented by the judgment of the Chancery Court herein. This Court will

not review the decision of a state Supreme Court when federal questions in a case are raised for the first time upon petition for rehearing to the state Supreme Court. *Rooker* v. *Fidelity Trust Co.*, 261 U. S. 114, 67 L. ed. 556; *Godchaux Co.* v. *Estopinal*, 251 U. S. 179, 64 L. ed. 213; *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 77 L. ed. 231 and *McGarrity* v. *Bridge Comm.*, 292 U. S. 19, 78 L. ed. 1095.

Conclusion.

In final analysis, in the case at bar the Supreme Court of Arkansas merely construed and applied the Arkansas statutes of limitation, and, such being the case, its decision is not subject to review by this Court.

Respectfully submitted,

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